FILE COPY

FILED
FEB 9 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. [redacted]69-5035

FRANK JOHNSON

versus

STATE OF LOUISIANA

Appeal From the Supreme Court of Louisiana

BRIEF OF THE STATE OF LOUISIANA, APPELLEE

JACK P. F. GREMILLION,
Attorney General of Louisiana
JIM GARRISON,
District Attorney
For the Parish of Orleans
LOUISE KORNS,
Assistant District Attorney
For the Parish of Orleans
Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana 70119
504 - 822-2414

SUBJECT INDEX

Page

STATEMENT OF THE CASE 1

ARGUMENT:

I A CONVICTION OR ACQUITTAL BY MAJORITY VERDICT OF THE JURY VIOLATES NEITHER THE DUE PROCESS CLAUSE NOR THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION 3

A. Due Process 8

B. Equal Protection 12

II THE MAJORITY SYSTEM AFFECTS THE VERDICT IN ONLY A TINY MINORITY OF CASES 17

III NO WARRANT IS NEEDED FOR AN ARREST BASED ON REASONABLE CAUSE 21

A. There Was Reasonable Cause For The Arrest 22

B. There Was No Need To Obtain A Warrant 24

CONCLUSION 35

CERTIFICATE 36

TABLE OF AUTHORITIES

Cases

Bailey v. United States, 261 F.2d 870 (5th Cir. 1958) 31

AUTHORITIES (Continued)

Page

Baldwin v. New York, 399 U.S. 66 (1970) 4, 19

Brinegar v. United States, 338 U. S. 160, 175 (1949) 23

Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958) 32

Carroll v. United States, 267 U.S. 132, 162 (1925) 23, 30

Chimel v. California, 395 U.S. 752, 778-780 (1969) 27, 30

Coffin v. United States, 156 U.S. 432 (1895) 9, 11

Davis v. Mississippi, 394 U.S. 721 (1969) 31, 32, 33

Draper v. United States, 358 U.S. 307, 310 (1959) 25

Duncan v. Louisiana, 391 U.S. 145 (1968) 4, 19

Fournier v. Gonzalez, 269 F.2d 26, 28 (1st Cir. 1959) 10

Gardner v. Michigan, 199 U.S. 325 (1905) 12

Henry v. United States, 361 U.S. 23, 98, 100-101 (1959) 26, 30

Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953) 10, 11

Hoffa v. United States, 385 U.S. 293 (1966) 19

In re Winship, 397 U.S. 358 (1970) 9

Ker v. California, 374 U.S. 23 (1963) 26

McCray v. Illinois, 386 U.S. 300 (1967) 23

AUTHORITIES (Continued)

Page

Mille· v. United States, 357 U.S. 301 (1958) 24

Odom v. United States, 403 F.2d 45 (6th Cir. 1968) 31

R. v. Adams, (1961) 1 W.L.R. 106 7

R. v. Bateson, (1969) 3 A11 E.R. 1372 7

Semayne's Case, 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1604) 22, 29

Sibron v. New York, 392 U.S. 40, 66 (Peter's Case) (1968) 23

State v. Green, 7 La.Ann. 518, 520 (1852) 4, 13

State v. Johnson, 230 So.2d 825, 325-332 (1970) .. 3, 34

State v. Lewis, 129 La. 800, 56 So.2d 893 (1911) .. 13

State v. Robbins, 176 Ohio St. 362, 199 N.E.2d 742 (1964) 9

Terry v. Ohio, 392 U.S. 1 (1968) 31

United States v. Coplon, 185 F.2d 629, (2nd Cir. 1950) 24

United States v. Di Re, 332 U.S. 581 (1948) 24

United States v. Montos, 421 F.2d 215, (5th Cir. 1970) 31

United States v. Wade, 388 U. S. 218 (1967) 33

Williams v. Florida, 399 U.S. 78 (1970) 7, 8, 9, 19

Wilson v. Schnettler, 365 U.S. 381 (1961) 26

Wong Sun v. United States 371 U.S. 471 (1963) .. 26

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 12

IV
AUTHORITIES (Continued)

Page

Textbooks, Law Review Articles, etc.

American Bar Association, Standards Relating To Trial By Jury (1968) 18, 19

Bloomstein, The Jury System (1968) 19

Carlisle, The Criminal Justice Act 1967, 1967 Crim.L.Rev. (Eng.) 613 18

Comment, On Instructing Deadlocked Juries, 78 Yale L.J. 100 (1968) 15, 16

Comment, Stop And Frisk, 63 N.W.U.L.Rev. 837 (1969) 31

Current L.Bk. 1967, sec. 2188 (ed. Burke, 1968) 7

Devlin, Trial By Jury (1956) 6

Fisher, Laws of Arrest (1967) 21, 31

J. Crim. L. (Eng.), V 32 (1968) 7

Kalven & Zeisel, The American Jury (1966) 14, 15, 16, 17, 18

Leagre, The Fourth Amendment And The Law Of Arrest, 54 J.Crim.L.C. & P.S. (1963) 21, 30, 31

Majority Verdicts, 116 New L.S. (pt. II) 1186, 1620 (1966) 6, 10, 19

Orfield, Criminal Procedure From Arrest To Appeal (1947) 21

Perkins, The Law of Arrest, 25 Iowa L.Rev. 201 (1940) 21, 29

AUTHORITIES (Continued)

Page

Roydhouse, Criminal Law and Criminal Justice Acts 1967 (1968) 19

Ryan, Less Than Unanimous Jury Verdicts In Criminal Trials, 58 J.Crim.L.C. & P.S. (1967) 5, 9, 20

Samuels, Criminal Justice Act, 31 Modern L.Rev. (1968) 6, 7, 10, 12, 19

Schwartzman & Stein, Law of Personal Liberties (1955) 21

Thayer, The Jury And Its Development, 5 Harv.L.Rev. 249 (1892) 6

Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt, 112 U.Pa.L. Rev. 769 (1964) 11

Waiver of Jury Unanimity-Some Doubts About Reasonable Doubt, 21 U.Chic.L.Rev. 438 (1954) 10

Wigmore, Evidence, v. 9, Sec. 2497 (3d ed. 1940) 11

Wilgus, Arrest Without A Warrant, 22 Mich.L. Rev. 541 (1923-24) 21

Wolbrette, Detention For Questioning in Louisiana 39 Tul.L.Rev. 69 (1964) 31

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1970

No. 5161

FRANK JOHNSON

versus

STATE OF LOUISIANA

Appeal From the Supreme Court of Louisiana

BRIEF OF THE STATE OF LOUISIANA, APPELLEE

STATEMENT OF THE CASE

At about 3:30 on the afternoon of December 26, 1967 Eugene Frischertz, route salesman for the Coca-Cola Bottling Company, was sitting in his truck getting ready to pull away from Brown's Grocery at 2139 Third Street in New Orleans when an armed robber pointed a revolver at him and demanded all of his money. R. 66-67. Frischertz handed the bandit $600.00 belonging to the Coca-Cola Company, the checks from the day's deliveries, and $31.00 of his own money. The gunman fled on foot and Frischertz used the telephone in the grocery to summon the police. R. 79. When the police arrived the route salesman gave them a description of the robber. R. 80-81.

The New Orleans Police around this time also received reports of other armed robberies of truck drivers. R. 18, 57.

Sometime during the next few weeks officers of the New Orleans Police Department got word from a confidential informer that Frank Johnson, Appellant herein, and another man had recently been involved in the armed robberies of several truck drivers. The police obtained from the Bureau of Identification a photograph of Frank Johnson and the other man mentioned by the informant, placed these two pictures in a group with others, and showed the photographs to one of the victims, a driver employed by Brown's Velvet Dairy Products, Inc., who had also been robbed recently. This driver positively identified Frank Johnson as the person who had held him up, marking Johnson's picture with his initials and the date. R. 17-18, 55-56, 85-86.

On January 20, 1968, members of the New Orleans Police Department went to Frank Johnson's house around six-thirty in the morning. They were admitted by Johnson's wife, found Johnson under the bed and arrested him for armed robbery. R. 18, 38, 58-60. Louisiana concedes that the officers had no warrant of arrest for Appellant.[1]

---

[1]No evidence pertinent to the instant case was seized by the police in the search following Johnson's arrest. R. 17, 61-62. In this connection this Court's attention is called to the fact that the Motion to Suppress filed by Appellant prior to trial (see R. 4, 10) was overruled as moot, R. 17, and the only physical evidence offered by the prosecution at the trial of this case was a photograph of the pretrial lineup, Exhibit S-1, at which Appellant was identified.

A few days later Frischertz picked Johnson out of a police lineup and identified Appellant as the man who had robbed him while Frischertz was working his Coca-Cola route on December 26, 1967. R. 68, 83.

On February 14, 1968 Frank Johnson was charged in a bill of information filed by the District Attorney for the Parish of Orleans with armed robbery of Eugene Frischertz in the amount of $631.00. See Art. 64 La. Crim. Code. The accused pleaded not guilty. He was tried, found by nine of the twelve man jury to be guilty as charged, and sentenced to serve 35 years in the Louisiana State Penitentiary. He appealed to the Louisiana Supreme Court, which affirmed his conviction. *State v. Johnson*, 255 La. 314, 230 So.2d 825 (1970). He appealed to this Honorable Court, which set the matter down for argument. In this Court Appellant complains of 1) the nine out of twelve jury verdict, and 2) his arrest without warrant.

ARGUMENT

I

A Conviction or Acquittal by Majority Verdict of the Jury Violates Neither the Due Process Clause nor the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution

Article 7, Section 41, of the Louisiana Constitution pertinently provides

> "Cases, in which the punishment may be at hard labor, shall be tried by a jury of five, all

> of whom must concur to render a verdict; *cases, in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict;* cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict.[2] (Italics ours)

Implementing the foregoing constitutional mandate, Article 782 of the Louisiana Code of Criminal Procedure stipulates:

> "Cases in which the punishment may be capital shall be tried by a jury of twelve jurors, all of whom must concur to render a verdict. *Cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict.* Cases in which the punishment may be imprisonment at hard labor, shall be tried by a jury composed of five jurors, all of whom must concur to render a verdict. Except as provided in Article

---

[2]The nine out of twelve jury first appeared in the Louisiana Constitution of 1898. See also La. Const. 1913, Art. 116. No explanation of why the majority verdict was adopted by Louisiana in 1898 has been found. But see *State v. Green*, 7 La.Ann. 518, 520 (1852) ("The frequency of their (the jury's) disagreement is undoubtedly a great evil, and perhaps would justify a constitutional or legislative provision for the verdict of a majority.")

The first sentence of Art. 7, Sec. 41, of Louisiana's present constitution, which provides for a judge trial in misdemeanor cases has, of course, been modified by this Court's decision in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and *Baldwin v. New York*, 399 U.S. 66 (1970).

780, trial by jury may not be waived."[3] (Italics ours)

Various theories have been advanced to explain the unanimous verdict requirement in jury trials which exists in many jurisdictions. One notion is that in centuries past there were very few rules to assure the accused a fair trial and that the practice of requiring unanimity among the jurors in order to convict was developed to protect the accused. Another theory is that the English Crown often exerted pressure on the judges to convict, and that to shift the pressure from themselves the judges initiated the unanimity rule. A third explanation is that unanimity was required to counterbalance the extremely harsh punishments which were imposed on convicted felons in times past. See Ryan, Less Than Unanimous Jury Verdicts in Criminal Trials, 58 J. Crim. L., C. & P. S. 211, 212 (1967).

The explanation offered by Lord Justice Devlin — that the unanimity rule developed by chance — is probably the correct one. In trial by compurgation, which existed in England in medieval times, twelve jurors were assembled to swear to the validity of a party's oath, and additional jurors were brought in until one party had twelve compurgators swearing to his position. As the function of the jury gradually shifted to judging credibility rather than swearing to it, the practice of adding to the original twelve jurors

---

[3]Art. 780 La. Code Crim. Proc. provides that a jury cannot be waived in either a capital case or one in which the imprisonment is necessarily at hard labor. Thus a jury could not have been waived in the present case.

was abandoned, but the requirement that the Crown obtain twelve votes to convict was kept. See Devlin, Trial By Jury 48 (1956); see also Thayer, The Jury And Its Development, 5 Harv.L.Rev. 249, 261 (1892).

Thus unanimity in criminal proceedings, which existed in England at the time this country was colonized, evolved from a type of majority verdict system which required that at least twelve of the jurors support the verdict.

At the present time many foreign and common law systems, notably former British territories, operate a majority system. See Samuels, Criminal Justice Act, 31 Modern L. Rev. 16, 25 (1968). The Scots have a long history of simple majority verdicts (8 to 7).[4] See Majority Verdicts, 116 New L. S. (pt. II) 1186 (1966). Moreover, in 1967 England itself, the originator of the jury system as we know it, adopted majority verdicts in criminal trials. The Criminal Justice Act enacted in that year provides in c. 80, s. 13, that the verdict of a jury in criminal proceedings need not be unanimous if in a case where there are at least eleven jurors ten agree on the verdict, or in a case where there are ten jurors, nine agree on the verdict, but that the court shall not accept a majority verdict of guilty unless the jury has deliberated for at

---

[4] In Scotland in addition to guilty and not guilty there is a third possible verdict of "not proven". Majority Verdicts, 116 New L. J. (pt. II) 1186 (1966).

least two hours. See 47 Halsbury's Statutes of England 381 (Cont. Vol. 1967).[5]

As this Court knows, in colonial times Connecticut permitted majority decision in case of continued failure to agree, Pennsylvania allowed majority verdicts, and the Carolinas also abandoned the unanimity requirement. See *Williams v. Florida*, 399 U.S. 78 (1970), n. 45, at 399 U.S. 98. Further, majority jury verdicts are legal in criminal cases in several jurisdictions in the United States today, in addition to Louisiana. Thus, in Oregon 10 out of 12 jurors may return a verdict of guilty except in murder cases, Art. I, Sec. 11, Ore. Const.; in Texas 9 out of 12 jurors may render a verdict in all criminal cases below the grade of felony, Art. V., Sec. 13, Tex. Const; in Montana 4 out of 6 jurors can render a verdict in misdemeanor cases, Art. III, Sec. 23, Mont. Const.; in Idaho a five out of six verdict is possible in misdemeanor cases, Art. I, Sec. 7, Idaho Const.; and in Oklahoma a three-fourths verdict can be returned in misdemeanor cases, Art.

---

[5]There are no alternate jurors in England. If during a trial a juror dies, or becomes ill, or for some other reason is discharged by the court, the remaining jurors continue to function as a valid jury provided the number is not reduced below nine. See Criminal Justice Act 1965, 45 Halsbury's Statutes of England 215 (2d ed. 1965).

For the Practice Direction on majority verdicts, see Current L. Bk. 1967, sec. 2188 (ed. Burke, 1968); see also 32 J. Crim. L. (Eng.) 30-32 (1968).

For criticism of the required two-hour deliberation time (an "arbitrary and artificial two-hour safeguard"), see Samuels, Criminal Justice Act, 3 Modern L.Rev. 16, 25 (1968). See also *R.V. Bateson*, (1969) 3 All E.R. 1372; *R.V. Adams*, (1969) 1 W.L.R. 106, for cases dealing with technicalities as to how the two hour deliberation time should be computed.

II, Sec. 19, Okla. Const. Also in Puerto Rico 9 out of 12 jurors can convict of a felony, Art. II, Sec. 11, P. R. Const.

In *Williams v. Florida*, supra, this Court rejected the idea that every feature of the jury as it existed at common law was necessarily included in the Constitution wherever that document refers to a jury. This Court's opinion in *Williams* also noted the fact that although as introduced by James Madison in the House, the Amendment relating to jury trial in criminal cases would have provided that the jury verdict must be, among other things, unanimous, and the Amendment passed the House with this requirement, the requisite of unanimity was deleted in the Senate, and as adopted the Sixth Amendment ensured an accused:

> "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ." (399 U.S. at 94)

A. Due Process

The issue for decision in the instant case is whether a majority jury verdict in State criminal trials violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by infringing upon the right of a person accused of a crime to be convicted only upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with

which he is charged. See *In re Winship,* 397 U.S. 358 (1970); *Williams v. Florida,* supra, n. 46 at 399 U.S. 100.

It is Louisiana's position herein that majority jury verdicts in no way infringe upon the reasonable doubt principle and hence do not deprive an accused person of Due Process of Law.

In Louisiana as in other common law jurisdictions the court in criminal trials always charges the jury that the accused is presumed by law to be innocent until his guilt is proven beyond a reasonable doubt, and that it is the duty of the jury, if not convinced of the guilt of the accused beyond a reasonable doubt, to find him not guilty. See Art. 804 (1) - (3) La. Code Crim. Proc.; *Coffin v. United States,* 156 U.S. 432 (1895); *In re Winship,* supra.

The question here seems to be whether the jury reaches its verdict as a body or as separate individuals. If we accept the view that the jury arrives at its verdict as a body, or entity, then certainly the burden or proof is lower if the prosecution does not have to convince all of the members of the jury of the guilt of the accused by proof beyond a reasonable doubt. However, the fallacy of the entity approach has often been demonstrated by, among other things, pointing out that under this theory the reasonable doubt of one juror would result in an acquittal instead of the hung jury which actually results. See *State v. Robbins,* 176 Ohio St. 362, 199 N.E.2d 742 (1964); Ryan, Less Than Unanimous Jury Verdicts in Criminal Trials, 58 J.Crim. L. C. & P. S. 211, 215 (1967).

On the other hand if we believe (as Louisiana does) that the jury decides a case as individuals, then the burden of proof beyond a reasonable doubt is in no way altered by the number of jurors who must be convinced of guilt to the constitutionally accepted degree. The burden remains the same because the majority who are empowered to decide must be convinced beyond a reasonable doubt. See *Fournier v. Gonzalez,* 269 F.2d 26, 28 (1st Cir. 1959); Samuels, Criminal Justice Act, 31 Modern L.Rev. 16, 24 (1968).

It has been suggested that the factor which changes as the number of jurors on the panel who must be convinced of guilt is reduced is the prosecution's burden of persuasion. See Waiver of Jury Unanimity — Some Doubts About Reasonable Doubt, 21 U. Chi. L. Rev. 438, 443 (1965), compare *Hibdon v. United States,* 204 F.2d 834 (6th Cir. 1953). Whether the prosecution's burden of persuasion is in fact lowered in cases decided by majority jury verdict is extremely doubtful, as will be shown in Part II of this brief. Certainly there exist no figures based on actual experience which suggest that the percentage of convictions in criminal cases is higher in jurisdictions which use the majority jury verdict.

In urging the adoption of the 1967 majority verdict law the English Home Secretary, Mr. Roy Jenkins, said that he did not believe that there was danger that the new rule would damage the innocent, and pointed to the example of the Scots, who have long applied a system of simple majority verdicts without such consequences. See Majority Verdicts, 116 New L.J.

1620 (pt. II 1966). The English example is certainly persuasive when we remember that the presumption of innocence and its corollary, the reasonable doubt standard, originated in England, and were brought to this country by Englishmen.

Moreover, it is incorrect to assume, as Appellant herein does, that a unanimous verdict is "inextricably interwoven with the required measure of proof." (*Hibdon v. United States,* supra, at 204 F.2d 838). Studies have shown that the unanimity rule and the reasonable doubt principle developed at different times and under different circumstances. See Unanimous Criminal Verdicts and Proof Beyond a Reasonable Doubt, 112 U. Pa. L.Rev. 769 (1964). As a matter of fact, the concept that in a criminal case guilt must be established beyond a reasonable doubt is a comparatively recent one, having been applied at first only in capital cases and having developed gradually as courts in this country and England struggled with the proper terms to use in instructing the jury as to the degree of certainty which must exist in the jurors' minds in order for them to reach a guilty verdict. See 9 Wigmore, Evidence 316-325, sec. 2497 (3d ed. 1940). Of course the presumption of innocence has long been rooted in English common law. See *Coffin v. United States,* 156 U.S. 432 (1895).

It is important to remember that a person accused of crime can be *acquitted* by a majority verdict as well as *convicted.* Proponents of the English majority verdict law point out that an accused would surely prefer an acquittal 10:2 than a disagreement and a re-

trial. See Samuels, Criminal Justice Act, 31 Modern L.Rev. 16, 25 (1968).

B. Equal Protection

Louisiana is of the respectful belief that the constitutional and statutory provisions here at issue — that criminal cases in which the punishment is necessarily at hard labor shall be tried by a jury composed of twelve jurors, nine of whom must concur to render a verdict — do not deprive Appellant of the Equal Protection of the Laws guaranteed to him by the Fourteenth Amendment to the United States Constitution, for the reason that all persons in similar circumstances are tried by the same type of jury. Thus, in being found guilty of armed robbery, for which the punishment in Louisiana is necessarily at hard labor, by the concurrence of nine out of twelve jurors, Appellant has been treated exactly like all persons in Louisiana who are tried for crimes for which the punishment is necessarily at hard labor. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); compare *Gardner v. Michigan*, 199 U.S. 325 (1905).

Moreover, the distinction which the Louisiana Legislature has made in the size and method of voting of juries in this State — that cases in which the punishment may be at hard labor shall be tried by a jury of 5, all of whom must concur to render a verdict; that cases in which the punishment is necessarily at hard labor shall be tried by a jury of 12, 9 of whom must concur to render a verdict; and that cases in which the punishment may be capital shall

be tried by a jury of 12, all of whom must concur to render a verdict — is not arbitrary, unreasonable, or capricious, as contended by Appellant, but, on the contrary, is calculated to expedite the administration of criminal justice in Louisiana, a purpose which grows more laudable as our criminal dockets become daily more congested and the administration of criminal justice becomes slower and more cumbersome. See *State v. Green*, 7 La.Ann. 518, 520 (1852), in which the Louisiana Supreme Court over a century ago suggested that the remedy for the jury's frequent disagreement might be the majority verdict; *State v. Lewis*, 129 La. 800, 56 So.2d 893 (1911).

The provision for majority verdicts (9 out of 12) in cases necessarily punishable at hard labor reduces the time it takes to try each case and also diminishes the necessity for a retrial due to a hung jury. Similarly, the five man unanimous jury required for crimes which may be punishable at hard labor saves manpower and time, as less jurors are needed for each case, less time is spent on voir dire examination, and it takes less time for five men to reach unanimity than for 9 or 12 men to arrive at this result. The provision that in capital cases the jury must be of 12 men and must reach a unanimous verdict is probably of more psychological than real value, as the thought of putting a fellow man to death fills most persons with some degree of awe and guilt.

It must be remembered that there are available no figures based on actual study and analysis to suggest that the percentage of convictions in criminal

cases decided by a majority jury verdict is any higher than in those cases decided by a unanimous verdict, because to our knowledge no one has undertaken such a project. However, the experience of Scotland, of various members of the British Commonwealth, and of England since 1967 strongly suggests otherwise. Moreover, figures compiled by Kalven and Zeisel in their recent book The American Jury, which analyses the legal decision-making process and attempts to evaluate the relative performances of judge and jury in similar cases, show that if allowed to deliberate long enough juries arrive at unanimity ninety-five percent of the time and hang the remaining five percent of the time, and that of the cases decided by unanimous verdict ninety-five percent of the time, the conviction-acquittal ratio is roughly 2 convictions for 1 acquittal. See Kalven and Zeisel, The American Jury 56-58, 461, 488 (n. 13) (1966). Moreover the authors' conclusion that the jury generally decides the case before deliberation begins, see pp. 488-489, casts doubt on the value of forcing the jury to deliberate for an extended period of time.

Thus, as shown by Kalven and Zeisel, Lousiana's 9 out of 12 jury, if allowed to deliberate long enough, would inevitably reach unanimity ninety-five percent of the time, at a ratio of 2 convictions to 1 acquittal. Additionally, of the five percent of cases which result in hung juries in unanimous verdict cases, 56 percent would be decided by a majority vote of 9 out of 12 (or 10 out of 12, or 11 out of 12) jurors — or only about three percent of all the cases tried by this type of jury. (56% x 5.5%) Of this three

percent of cases decided by 9 out of 12, etc., jurors (that would hang in Louisiana in capital cases and cases in which the punishment may be at hard labor) the conviction-acquittal ratio is at a somewhat higher rate, or approximately 3 1/2 convictions to 1 acquittal instead of 2 convictions to 1 acquittal. *Id.* at pp. 460-461. However, we must remember that in some of the five percent of cases which end in a hung jury in the unanimous jury cases the accused will be convicted on retrial, at a ratio we do not know. Consequently it appears that there is no appreciable difference in the percentage of convictions by a majority verdict as compared to a unanimous verdict. That is, it appears that the majority of the jurors have the same high threshold of reasonable doubt as the entire jury, which interprets the proof beyond a reasonable doubt principle more generously than does a judge. *Id.* at p. 189. The explanation of the foregoing is found in The American Jury at p. 488-489, where the authors conclude that the function of the jury's deliberation process is not so much to decide the case as to bring about a consensus.[6] See also Comment, On Instructing Deadlocked Juries, 78 Yale L.J. 100, 109 (1968).

Thus in the instant proceedings there was a 95% chance that the jury which convicted Appellant would have reached unanimity had it continued its deliberations beyond the 9 to 3 stage instead of returning to court with its verdict at this point. There was also a 2% chance that the jury would hang at 8:4, 7:5,

---

[6] **"The deliberation process might well be likened to what the developer does for an exposed film; it brings out the picture, but the outcome is pre-determined."**

or 6:6, with at least a 50% (and perhaps higher) chance that Appellant would be convicted later. In view of the jury vote which actually occurred herein (9:3), there was almost no chance that Appellant could have been acquitted, as figures in Kalven and Zeisel's book show that "only with extreme infrequency does the minority succeed in persuading the majority to change its mind during the deliberation." The American Jury, at p. 488. Of course, prior to trial there was a 33% chance of Appellant's being acquitted by a unanimous verdict plus an additional approximately 1% chance of acquittal by a majority verdict.

Furthermore, we can conclude that the 9, 10, or 11 jurors out of 12 who vote for conviction or acquittal in Louisiana in cases necessarily punishable at hard labor believe firmly in their decision and are not pressured into the majority view, because if any one of them wants to dissent from the majority he has at least one supporter to back up his position, a significant factor in the opinion of those who have studied the manner in which juries operate. See Comment, On Instructing Deadlocked Juries, 78 Yale L.J. 100, 110 (1968) ("A single ally gives most dissenters the courage to voice their true convictions."); Kalven and Zeisel, *op. cit. supra*, p. 463.

In view of the fact that there is no factual basis to suppose that Appellant ran a higher risk of conviction when tried by a jury of 12, 9 of whose members could return a verdict, and the further fact that all accused persons in Appellant's class are similarly tried by majority verdict, the State of Louisiana respect-

fully suggests to this Court that there is no merit to Appellant's Equal Protection argument.

II

The Majority System Affects the Verdict in Only a Tiny Minority of Cases

As was poined out above, Kalven and Zeisel in their recent book The American Jury show that if allowed to deliberate long enough the jury reaches a unanimous verdict in approximately 95 percent of all cases, and that in approximately 5 percent of all cases the jury hangs. Moreover, the conviction-acquittal ratio of the unanimous verdicts arrived at in 95 percent of the cases is 2 convictions for 1 acquittal. See Kalven and Zeisel, The American Jury 56-58, 461, 488 (n. 13) (1966).

Thus we may assume that in Louisiana juries would eventually arrive at a unanimous verdict, at a conviction-acquittal ratio of 2 to 1, in 95 percent of all cases in which punishment is necessarily at hard labor if the jury continued its deliberations beyond the 9 to 3 stage. Further, from Table 25 of The American Jury, p. 460, which shows the last vote of hung juries, we can also assume, as do Kalven and Zeisel, that of the remaining 5 percent of cases in which the jury hangs in unanimous verdict cases, a 9:3, 10:2, or 11:1 verdict would be reached in Louisiana in cases necessarily punishable at hard labor 56 percent of the time — or in *approximately 3 percent of the total number of cases of this type tried in Louisiana.*

When we remember that of this 3 percent of the cases which are decided in the 9 out of 12 category when the unanimous jury hangs, the accused is often convicted on retrial in the unanimous jury cases,[7] we readily see that Louisiana's majority jury verdict only actually affects a very small minority of cases. It is also relevant to note that The American Jury, which deals, among other things, with the higher rate of convictions in judge trials as compared to jury trials, does not indicate that there is a higher conviction rate in jurisdictions like Louisiana which allow majority jury verdicts in criminal cases; on the contrary, the authors suggest wider use of the majority verdict in order to reduce the number of hung juries. See p. 461. See also Carlisle, The Criminal Justice Act 1967, 1967 Crim. L. Rev. (Eng.) 613, in which the author notes that the new English majority verdict law is "unlikely to affect more than a tiny minority of cases".

Although the majority verdict actually affects the type of verdict ultimately arrived at in only a small fraction of all the cases tried in this manner, the system saves considerable time in all cases in which it is used because the jury returns to the courtroom with its verdict as soon as nine of its members agree either to convict or acquit.

---

[7]The proportion of convictions that are obtained after the first trial ends with a hung jury is not known. See A.B.A. Standards Relating to Trial by Jury 27 (1968). Kalven and Zeisel suggest that roughly half the hung jury cases end up as an acquittal, but state that they were unable to obtain reliable statistics on the final disposition of the hung jury cases, and that the practice varies according to jurisdiction. See The American Jury, pp. 57-58 n. 4.

Additionally, it would appear that prevention of oppression by the Government, which is the primary purpose of the jury trial (see *Duncan v. Louisiana*, 391 U.S. 145 (1968): *Williams v. Florida*, 399 U.S. 78 (1970); and *Baldwin v. New York*, 399 U.S. 66 (1970)) is in no way affected by the use of a majority verdict, as there still exists a body of laymen whose judgment is interposed between the accused and his accuser and who are less likely to function or appear as but another arm of the Government that is bringing the charge.

In England the Government's chief reason for changing from the unanimous to the majority jury verdict was the mounting problem of corruption or intimidation of jurors ("nobbling") to prevent a unanimous vote for conviction, chiefly in cases involving organized crime, and also in order to neutralize the perverse juror. It was pointed out that failure of the jury to arrive at a verdict wastes time, money, and judge power, especially in a long case. See Majority Verdicts, 116 New L.J. (pt. II) 1186, 1620 (1966); Samuels, Criminal Justice Act, 3 Modern L.Rev. 16, 24 (1968); Roydhouse, Criminal Law and Criminal Justice Acts 1967, p. 117 (1968); Bloomstein, The Jury System, p. 112 (1968). For an example of "nobbling" in this country, see *Hoffa v. United States*, 385 U.S. 293 (1966), involving the Test Fleet trial, which ended with a hung jury.

It is also relevant to note that in its Minimum Standards For Criminal Justice the American Bar Association has recently recognized "the propriety of less than unanimous verdicts, as now permitted in six states."

See Standards Relating to Trial By Jury 28, sec. 1.1(d) (1968).

One of the advantages of federalism is that it permits different courses of action to be follow[illegible] in different States simultaneously. At the present time England has changed over to majority verdicts,[8] and leading authorities in this country have approved the use of majority verdicts in order to improve the administration of criminal justice.

In Louisiana and the other States which presently use the majority verdict system we have an unparalled opportunity to study this procedure in actual operation, and to compare its advantages and disadvantages with the unanimous verdict procedure. No one has ever contended, much less demonstrated, that the rate of conviction is appreciably, or even slightly, higher in jurisdictions such as Scotland and Louisiana which employ majority jury verdicts; on the other hand, it has been effectively shown that time, money and judge power are saved through use of this procedure. It is respectfully submitted to this Court that Louisiana should be allowed to retain its majority verdict procedure, which has served it well in the past 72 years.

---

[8]It has been suggested that the English system is more flexible than ours because the English Constitution, unlike ours, is a product of the common law and easily adapts to changing circumstances. Ryan, Less Than Unanimous Verdicts, 58 J. Crim. L.C. & P.S. 211, 213 (1967).

III

No Warrant Is Needed for an Arrest Based on Reasonable Cause

Article 213 of the Louisiana Code of Criminal Procedure provides that a police officer may, without a warrant, arrest a person when there is reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer. Article 216 of the Code states that an arrest may be made on any day, at any time of the day or night, and at any place. Article 224 of the Code allows an officer who has announced his authority and purpose to enter any dwelling in which the person to be arrested is reasonably believed to be, in order to make the arrest.

At common law it has long been the rule that a peace officer has the right and even the duty to arrest without a warrant a person whom he has reasonable ground to believe has committed a felony, although not in his presence. See Fisher, Laws of Arrest, pp. 124-136, 166-178 (1967); Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 233-234 (1940); Schwartzman and Stein, Law of Personal Liberties, p. 14 (1955); Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L., C. & P. S. 393, 403 (1963); Orfield, Criminal Procedure From Arrest To Appeal, p. 14-23 (1947); Wilgus, Arrest Without A Warrant, 22 Mich. L. Rev. 541, 560, 673 (1923-24).

Further, it has been settled since early times that an arrest for a felony can be made, with or without

a warrant, in the house of the arrestee himself, although generally the officer cannot break in the door to make the arrest unless he has been refused admittance after announcing his authority and purpose. See *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194 (K.B. 1604).[9]

A. There Was Reasonable Cause For The Arrest

The record in this case shows that approximately three weeks after Eugene Frischertz, route salesman for the Coca-Cola Bottling Company, was robbed, Officer Theodore Feld through his superior officer, Captain Newman, received information from a confidential informer that Frank Johnson, Appellant herein, and a Harold Hayes were engaged in armed robberies of truck drivers. Officer Feld obtained from the Bureau of Identification photographs of Frank Johnson and Hayes, placed these pictures in a group with others, and sent Detective John Lanza to show the collection of photographs to a Marion Catalano, a truck driver for Brown's Velvet Dairy, who, as the police knew, had also been robbed recently. Catalano picked out pictures of Frank Johnson and Harold Hayes as the men who had robbed him, marking the photographs

---

[9] "J. beats R. so as he is in danger of death, J. flies, and thereupon hue and cry is made, J retreats into the house of T. they who pursue him (D), if the house be kept and defended with force (which proves that first request ought to be made) may lawfully break the house of T. for it is at the K's suit." *Semayne's Case*, 77 Eng. Rep. at 196 (K.B. 1604).

"(D) Either with or without a warrant, and whether the pursuit is by a constable or private person. Hawk. P.C.B. 2 chap. 14. 27."

with his initials and the date of the offense. R. 55-56, 17-18.

Thus at the time the New Orleans Police Officers arrested Frank Johnson they knew that several truck drivers had been robbed recently; they had information from a confidential informer that Frank Johnson had been involved in one or more of those robberies; and Catalano, a Brown's Velvet Dairy truck driver who had recently been robbed, picked the photograph of Frank Johnson out of a group of pictures which the police showed him and positively identified Appellant as the man who had held him up.

Reasonable (or probable) cause to make an arrest exists, as this Court knows, when the facts and circumstances within the arresting officer's knowledge, and of which he has trustworthy information, are sufficient in themselves to justify a man of average caution in the belief that the person he is arresting has committed a crime. Further, in determining compliance with this standard of reasonable cause, the degree and type of proof required for conviction is not necessary. The proof needed to satisfy the requirement of reasonable cause for a warrantless arrest is commensurate with the term itself — that is, the probabilities and practical considerations of everyday life on which reasonable men can be expected to act. *Carroll v. United States,* 267 U.S. 132, 162 (1925); *Brinegar v. United States,* 338 U.S. 160, 175 (1949); *McCray v. Illinois,* 386 U.S. 300 (1967); *Sibron v. New York,* 392 U.S. 40, 66 (Peter's case) (1968).

Louisiana respectfully suggests to this Court that the police officers in the present proceeding acted upon reasonable cause.

B. There Was No Need To Obtain A Warrant

There was no necessity for the officers in the instant case to secure a warrant in order to arrest Appellant. Having statutory authority to make arrests without a warrant when reasonable cause exists, see Art. 213 La. Code Cr. Proc., police officers in Louisiana never swear out an arrest warrant in a case such as the present one where they know the whereabouts of the person to be arrested and he is within their jurisdiction. As a practical matter, if the police had to spend half a day or more preparing an arrest warrant with supporting affidavit and submitting it to a judge for study and approval every time they took a person into custody or picked up a runaway child, their efficiency would be seriously impaired. It must be remembered that the State police have the duty of preserving the public peace, unlike federal agents, who have no general peace keeping duties. Consequently, no broad statute permitting warrantless arrests similar to Louisiana's Article 213 of the Code of Criminal Procedure exists in federal law, as none is needed. However, for many years federal arrests were governed by state law. *United States v. Di Re*, 332 U.S. 581 (1948); *Miller v. United States*, 357 U.S. 301 (1958); *United States v. Coplon*, 185 F.2d 629, 633-635 (2d Cir. 1950); and in the past forty years Congress has authorized various federal officials to make warrantless arrests, *e.g.*, 18 U.S.C. § 3052 (F.B.I. agents); 18 U.S.C. § 3053 (United States Marshals); 18 U.S.C. § 3056 (Secret Service

agents); 26 U.S. § 7607 (2) (Bureau of Narcotics agents).

Although the precise question here at issue was not posed, this Court has upheld arrests without warrant in situations in which there would have been time to procure one. In *Draper v. United States,* 358 U.S. 307 (1959), an informant on September 3, 1956, told Marsh, a federal narcotic agent, that Draper had recently taken up abode at a stated address in Denver and was peddling narcotics to several addicts in that city. Four days later, on September 7, the informer told the agent that Draper had gone to Chicago the day before by train, that he was going to bring back three ounces of heroin and that he would return to Denver on the morning of either September 8 or September 9, also by train. At this time the informer gave Marsh a detailed physical description of Draper. On the morning of September 9 the agent arrested Draper as he alighted from an incoming Chicago train. In its opinion in *Draper* this Court set out the provisions of 26 U.S.C. § 7607, added by § 104 (a) of the Narcotic Control Act of 1956, 70 Stat. 570, which allows an agent of the Bureau of Narcotics to make an arrest without warrant when the agent has reasonable grounds to believe that the person to be arrested is committing a narcotic offense (and which is similar to Article 213 of the Louisiana Code of Criminal Procedure) and said:

> "The crucial question for us then is whether knowledge of the related facts and circumstances gave Marsh 'probable cause' within the meaning of the Fourth Amendment, and 'reasonable grounds' within the meaning of

> § 104 (a) *supra*, to believe that petitioner had committed or was committing a violation of the narcotic laws. If it did, the arrest, *though without a warrant*, was lawful ...." 358 U.S. at 310. (Italics ours)

See also *Ker v. California*, 374 U.S. 23 (1963); compare *Henry v. United States*, 361 U.S. 98 (1959), and *Wong Sun v. United States*, 371 U.S. 471 (1963), in which this Court held arrests without warrant to be invalid because not based on probable cause within the meaning of the Fourth Amendment nor reasonable grounds within the meaning of the arrest without warrant statutes.

In *Wilson v. Schnettler*, 365 U.S. 381 (1961), federal agents arrested petitioner without a warrant and seized narcotics which they found on his person in the course of an incidental search. Petitioner sued in federal district court to impound the narcotics, to enjoin their use in evidence, and to enjoin the agents from testifying against him. Although his complaint alleged that the arrest was made without a warrant, there was no allegations that it was made without probable cause. This Court sustained dismissal of the complaint for failure to state a claim upon which relief could be granted. In its opinion this Court said that if the agents had probable cause "the arrest, though without a warrant, was lawful". 365 U.S. at 383.

In the present case the Coca-Cola Company robbery occurred on December 26, 1967. R. 57. On January 18, 1968 a confidential informer told Captain Newman of the New Orleans Police Department that Appellant and

a Harold Hayes were involved in the armed robbery of truck drivers. R. 56. The police got pictures of Johnson and Hayes from the B. of I., placed these photographs in a group with others, and showed them to Marion Catalano, a truck driver for Brown's Velvet Ice Cream who had been robbed three times recently. Catalano positively identified Appellant as the man who had robbed him. The record does not show the date on which Catalano made this identification, but it was probably done on January 19, the day following the informer's tip because the record shows that there was a little difficulty in finding the truck driver, who was out on his route. R. 58-59. On January 20, two days after receiving the confidential tip, at about six-fifteen or six-thirty in the morning, Lieutenant Theodore Feld of the Robbery Division and five other armed officers went to Appellant's home at 2135 Philip Street in New Orleans, and knocked on the front door. The officers had no warrant of arrest. R. 55, 58-59. When Mrs. Johnson came to the door the officers identified themselves as the police and said that they had come to arrest Frank Johnson for robbery. R. 36, 50-53, 58-60. Mrs. Johnson admitted the officers, who found Appellant under the bed and arrested him for armed robbery of Catalano. R. 51, 58, 60, 104. A search of the bedroom, the second room and the kitchen was conducted in an effort to find an automatic revolver,[10] but the search was unsuccessful in this respect, R. 61, and the police were unable to find any evidence

[10]This search was conducted prior to this Court's 1969 decision in *Chimel v. California*, 395 U.S. 752.

during this search which could be used by the prosecution during the trial of this case. R. 106-107.[11]

Appellant was taken to police headquarters and charged with several armed robberies. R. 63. Three days later, on January 23, 1968, Eugene Frischertz, route salesman for Coca-Cola Bottling Company, picked Appellant out of a lineup and identified Appellant as the man who had robbed him on December 26, 1967. R. 66-68. Appellant was represented by counsel at this time. R. 49-51.

It is Appellant's contention herein that his arrest without warrant was unconstitutional, that his detention following arrest was unlawful, that the lineup identification of him which was made by Frischertz during that detention was illegally obtained, and that therefore his conviction should be reversed.

As a practical matter it is doubtful whether the police officers in the present proceeding had time to obtain an arrest warrant. Catalano's identification of Frank Johnson as one of the men who had robbed him probably took place on January 19, the day after the police received the confidential tip involving Appellant in the robberies of truck drivers. Johnson was arrested at six-thirty on the following morning, January 20, 1968. It takes at best three or four hours, and often a couple of days, for police officers to draw up an affidavit setting out reasonable cause for arrest and to submit the

---

[11]**The officers picked up "a little syringe and a spoon that was used with narcotics" which were in plain view on the mantel piece. R. 61-62.**

application for the warrant to a Criminal District Court Judge for the Parish of Orleans for study and approval.

The State of Louisiana respectfully contends that no arrest warrant was necessary and that the officers in this case were justified in relying on the statutory authority to arrest without warrant which has been conferred on them by Articles 213, 216 and 224 of the Louisiana Code of Criminal Procedure, and that because reasonable, or probable, cause to make the warrantless arrest existed herein there was no violation of the Fourth Amendment

Initially Louisiana directs this Court's attention to the fact that historically the home has never been a sanctuary against arrest, for the reason that "the liberty or privilege of a house doth not hold against the King." *Semayne's Case*, 5 Coke 91, 77 Eng. Rep. 194, 197 (K. B. 1604); see Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 244 (1940). Thus it has long been settled that society's right to arrest one who breaks its laws takes precedence over the common law rule that a man's house is his castle.

The general warrants (or writs of assistance as they were known in the American Colonies), abhorrence of which furnished the basis for the Fourth Amendment's prohibition against unreasonable searches and seizures, were in violation of the existing common law rules in that they were not required to be based on evidence giving rise to a reasonable presumption that a crime was being or had been committed, but were, on the contrary, blanket written authorizations given by the English King to his officials (and good for the

life of the sovereign in the case of the writ of assistance) which permitted the officer holding the general warrant or writ of assistance to arrest whomever he wanted, according to his personal whim and regardless of probable cause. See *Henry v. United States*, 361 U.S. 98, 100-101 (1959); Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L.C. & P.S. 393, 396-397 (1963). Therefore, state statutes such as Article 213 of the Louisiana Code of Criminal Procedure which permit an arrest without warrant when the peace officer has reasonable, or probable, cause to believe that a crime is being or has been committed cannot be likened to writs of assistance or general warrants in the respectful view of Louisiana.

Moreover several practical aspects of the arrest procedure must be kept in mind. For one thing, the fact of mobility which justifies the search of an automobile without a warrant, see *Carroll v. United States*, 267 U.S. 132 (1925), is also present in the arrest of a person. In this respect an arrest differs radically from a search for inanimate property. Additionally, reasonable police practice often requires that an arrest be postponed, either until sufficient evidence is obtained to furnish reasonable grounds for the arrest, as in the case at bar, or in order not to alert other participants in the crime, yet in many cases, even after considerable delay, quick action by the police in making the arrest may be necessary. Also, often by the time probable cause to arrest a man has developed he is on the verge of flight. These considerations persuaded Congress to give the FBI the authority to arrest without a warrant without any showing of probability of flight. See *Chimel v. California*, 395 U.S. 752, 778-780 (1969)

(dissenting opinion of White, J.): Leagre, The Fourth Amendment and the Law of Arrest, 54 J. Crim. L.C. & P.S. 391, 405 (1963).

For lower federal court decisions holding that an arrest warrant is unnecessary even if there is time to secure one, see *United States v. Montos*, 421 F.2d 215, 225 (5th Cir. 1970); *Odom v. United States*, 403 F.2d 45 (6th Cir. 1968); *Bailey v. United States*, 261 F.2d 870 (5th Cir. 1958).

Further, if a warrant must be obtained for an arrest, which can only be made if there is probable cause to believe that a crime has been committed, must a warrant also be secured every time the police detain a person for investigation? As this Court knows, the police may detain a man for several hours for investigative purposes on something less than probable cause for arrest. In determining whether such a detention is justifiable two factors must be considered: 1) whether the circumstances justify an investigation; and 2) whether the extent of the detention is appropriate under the existing facts. See Wolbrette, Detention For Questioning in Louisiana, 39 Tul. L. Rev. 69 (1964); Fisher, Laws of Arrest, Situations Distinguished From Arrest, pp. 58-98 (1967); Comment, Stop and Frisk, 63 Nw. U.L.Rev. 837, 845-848 (1969); compare *Terry v. Ohio*, 392 U.S. 1 (1968).

Davis v. Mississippi, 394 U.S. 721 (1969), relied on by Appellant herein, presents a totally different fact situation from the one existing in the present case. There the only evidence the police had following a rape were finger and palm prints on the window through

which the rapist had entered the victim's home and the victim's vague description of her assailant as "a Negro youth." During the ten day period following the commission of the crime the police took at least 24 black youths, among them Davis, to headquarters, where they were questioned briefly, fingerprinted and released. Thereafter the police arrested Davis, although no reasonable grounds to believe that he had committed the crime existed, and two days after the arrest, while in jail, Davis was again fingerprinted. Later, after more evidence had been found, Davis was tried for the rape and convicted, partly on the strength of the fingerprint evidence. This Court set aside the conviction on the ground that Davis' fingerprints were invalidly obtained on both occasions and thus were inadmissible in evidence during Davis' trial. Also in *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958), cited and quoted from with approval by this Court in its opinion in *Davis*, the arresting officer had no reasonable ground to believe that Clayborne Bynum had committed a felony.

In the case presently before the Court, on the other hand, the arresting officers had reasonable ground to believe that Appellant had recently robbed Marion Catalano, a truck driver for Brown's Velvet Dairy Products, and it was for this reason that Appellant was arrested. R. 55-58.

Louisiana also respectfully contends that there is a marked difference between the finger and palm prints which were taken from Davis and subsequently introduced as evidence at his trial and the lineup identification of Appellant by Frischertz in the instant case.

The fingerprints obtained from Davis during his illegal detention constituted concrete, tangible physical evidence which was introduced by the prosecution during the trial. In the present proceeding the prosecution's whole case was based on the in-court identification of Appellant by the Coca-Cola Company truck driver whom Appellant robbed, Eugene Frischertz. R. 66-93. This in-court identification of Appellant by Frischertz must be held to have a source independent of the pretrial lineup in view of the fact that Frischertz was robbed at about 3:30 in the afternoon and was able to get a good, close look at the robber, who was wearing no face mask or other type of disguise, and whose physical appearance during the commission of the crime made a strong impression on Frischertz. See *United States v. Wade,* 388 U.S. 218, 241-242 (1967). Thus, although the pretrial lineup was referred to by the witness several times, particularly during cross-examination and was described in detail, and a picture of the lineup was introduced, the evidence on which Appellant was convicted by the jury was clearly Frischertz' strong identification of Appellant during the trial, based on the fact, as described by Frischertz, that on the day of the robbery the witness had seen Appellant approaching in his rear view mirror on the side of his truck, and that when he got to the door of the truck Appellant held a gun on Frischertz and the driver's two helpers and said, "Give me all your money." R. 67, 78, 81-82. Thus, the lineup identification here at issue was not an independent piece of evidence offered by the prosecution to prove the guilt of the accused, as in *Davis,* but was only offered to corroborate the strong in-court identification of Appellant made by Frischertz.

Furthermore, Appellant in the instant proceedings, unlike Davis, did not during his trial object to testimony concerning the pretrial lineup in which he had been identified by Frischertz, and raised this issue *for the first time* when his case was appealed to the Supreme Court of Louisiana. Thus the trial judge was given no opportunity to rule on the admissibility of testimony concerning the pretrial lineup, and under Louisiana law waived any objection thereto. See Arts. 841-845, 920 La. Code Crim. Proc.[12]

For the foregoing reasons the State of Louisiana is of the respectful belief that the warrantless arrest of Appellant herein was valid and constitutional even though the police officers may have had sufficient time to swear out a warrant of arrest. Alternatively, it is Louisiana's position that introduction of evidence of the pretrial lineup identification of Appellant by Frischertz during the trial was at most harmless error in view of the strong in-court identification of Appellant by Frischertz and the fact that this in-court identification had a source independent of the pretrial lineup.

---

[12]**The accused filed a Motion to Suppress prior to trial and a hearing was held thereon, during which it developed that no evidence material to this case was seized by the police in their search of Appellant's house following his arrest, and for this reason the trial judge decided that the Motion to Suppress was moot. R. 14-18, 26-29. At the time the prosecution offered the lineup photograph, S-1, in evidence defense counsel objected only on the ground that it had not been properly identified. R. 99-100. In the Louisiana Supreme Court the State contended that Appellant had waived the question of the admissibility of his lineup identification by failing to timely object; however, that court decided the question on the merits. See *State v. Johnson*, 255 La. 314, 325-332; 230 So.2d 825 (1970).**

CONCLUSION

The State of Louisiana respectfully requests that this Honorable Court affirm the judgment of the Supreme Court of Louisiana in this case.

JACK P. F. GREMILLION
Attorney General of
Louisiana

JIM GARRISON,
District Attorney for
the Parish of Orleans

LOUISE KORNS,
Assistant District Attorney
for the Parish of Orleans

CERTIFICATE

I certify that copies of this Brief have been mailed to:

Richard A. Buckley, Esq.
4038 Cheena Drive
Houston, Texas 77025
Telephone: A/C 713-666-7156

John W. Reed, Esq.
Robert Glass, Esq.
New Orleans Legal Asst. Corp.
605 Carondelet Building
New Orleans, Louisiana 70130
Attorneys for Appellant

Frank E. Williams, Jr.
Research Assistant
3903 Canal Street
New Orleans, Louisiana 70119

LOUISE KORNS,
Assistant District Attorney
for the Parish of Orleans
Criminal Courts Building
2700 Tulane Avenue
New Orleans, Louisiana
A/C 504-822-2404